

August

2010

ZIMMER KUNZ PLLC'S VIEWS & NOTES

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Health Care Reform: Will it affect workers' compensation?

One of the biggest impacts of the new Health Care Reform is the amendments to the 30 year old Federal Black Lung Benefits Act. The amendment will enable coal miners and their families to become eligible for benefits if they have 15 years in the coal mine industry and is retroactive to the year 2005. The changes, which were sponsored by Senator Robert C. Byrd, D-W. Va., alter the burden of proof once a miner reaches the 15 year threshold and has a positive x-ray; he is presumed to have the disease. The burden then shifts to the employer and is essentially: "You must prove that the claimant does not have the disease or it was not incurred in the mines or is not totally disabled."

Experts predict that this will vastly increase the number of new claims which will be filed. One source estimates \$120 million in

costs related to the amendment (A.M. Best Company, Inc.). Ironically, the change merely resurrects the changes that had been repealed back in the early 1980's. One of the other changes is that widows of miners who receive lifetime benefits do not have to prove that a miner's death was related to coal worker's pneumoconiosis. Even if the miner was struck and killed by a car, the burden would be on the employer to incur defense costs related to proving the event. Naturally, insurance company experts are complaining that when the premiums were assessed from the year 2005 to 2009 and even in 2010, those risks were not contemplated. The retroactivity of the amendments and the shifted burden are considered huge burdens on the insurance industry and laced with unfair retroactivity.

Many states are tied to the Medicare or Medicaid fee schedules (including Pennsylvania). Many new provisions in the fee schedules could have an impact on the payment of medical expenses.

Some experts believe that there will be both a positive and negative impact on workers' compensation as a result of Health Care Reforms. One expert, Joseph Paduda writing for Property & Casualty (published 4/30/10), believes that CMS (Center for Medicare and Medicaid Services) will be so busy expanding Medicaid by one third, revising hospital reimbursement, changing physician compensation, and re-writing Medicare Part D, they will not care about workers' compensation. (Continued on page 3)

Edward Dixon



PA Supreme Court: Skier Assumed Risk of Falling from Chair Lift; Pre-injury Release of Ski Resort is Enforceable

Chepkovich v. Hidden Valley Resort, L.P., (PA 2010)

On June 21, 2010, the Pennsylvania Supreme Court reaffirmed the doctrine of assumption of the risk as it applied to the sport of downhill skiing. Additionally, the court determined that a release agreement signed by a skier before engaging in the sport was valid

and enforceable.

On December 31, 2001, Lori Chepkovich and her family were skiing on the slopes of Hidden Valley Resort. Lori and her six-year-old nephew, on their return to the condominium where they were staying, rode the "Blizzard" ski lift. Due to the nephew's small size, Lori asked the ski lift operator to slow the lift to enable her

nephew to board safely. The ski lift operator notified Lori that the lift had only one speed, but he would stop it twice to allow them to board. The operator stopped the lift once to allow Lori and her nephew to move to the front of the line, but did not stop the lift a second time to allow them to board. (Continued on page 5)

ZK Results

Case One: An eight year old resident of the Defendant trailer park sustained significant injuries when bitten in the face by another tenant's dog. The tenant sued the trailer park claiming that the trailer park knew or should have known that the dog was vicious. In addition, the tenant alleged that the rules and regulations for the trailer park created a duty for the trailer park to determine if the tenants' dogs were safe. In response to these claims, the trailer park argued that Pennsylvania law requires actual

Case Two: Following an arbitration hearing in Allegheny County, Pennsylvania, Attorney **Kerry Shimborske-Abel** received a defense verdict on a slip and fall case wherein the Plaintiff alleged that as he was exiting the door of the insured's premises, he was caused to fall due to a disparity in elevation between a section of the carpet on the hallway floor and the surrounding floor area. As a result of his fall, the Plaintiff alleged that he sustained a fracture of his nose and a laceration that required seven

Case Three: In another recent case, the plaintiffs/insured suffered a fire loss at their condominium. The insurer's claim staff inspected the loss and prepared a preliminary damage estimate within one week of the incident. At the same time, the insured moved into an expensive hotel without a kitchen. The insurer found temporary housing, but the insured refused to move. The insurer offered to pay undisputed damages and made advanced payments on

Case Four: The plaintiff was the owner of a large commercial building which suffered severe damage when the heating coil in a HVAC system ruptured and caused flooding throughout the building. The plaintiff sued the general contractor for the construction of the building, as well as various

knowledge of the dog's vicious propensities for a landlord out of possession to be liable to a tenant for injuries caused by another tenant's dog. Further, it was argued that in this case the tenant had not produced evidence to establish actual knowledge. Also, the trailer park argued that Pennsylvania law did not support the claim that the rules and regulations for the trailer park created a duty. The Court of Common Pleas of Washington County, Pennsylvania agreed with the trailer park's position and entered

summary judgment in favor of the trailer park. The Defendant trailer park was represented by **John W. Zotter** of Zimmer Kunz, PLLC.

sutures. After hearing testimony from the Plaintiff and representatives of the insured which showed that the Plaintiff had been on the insured's premises several times prior to his fall, and that the insured had no notice of the alleged condition that allegedly caused the Plaintiff's fall, the arbitration panel found in favor of the Defendant.

contents. Dwelling coverage was tendered without the insured commencing repairs or hiring a contractor. The contents limit was not paid for nearly a year from the accident because of failure to provide documentation. At the conclusion of the claim, the insured filed a breach of contract and bad faith action, alleging that the insurer acted in bad faith in unreasonably delaying payment. Attorney **Sharon Hall**, on behalf of the insurer, was granted partial summary

summary judgment in favor of the trailer park. The Defendant trailer park was represented by **John W. Zotter** of Zimmer Kunz, PLLC.



John W. Zotter



Kerri Shimborske-Abel

judgment for the insured's breach of contract action. During trial, the Court found that the insured failed to show that the insurer acted with ill will or self interest and ruled in favor of the Defendant.



Sharon Hall

subrogation clause in the construction contract between plaintiff and the general contractor acted as a complete bar to the plaintiff's claim as well as to the cross-claims from the co-defendants. After oral argument by **Dara Decourcy**, the Court granted the Motion and dismissed the claims entirely.

ZK News:

George Stewart was recently selected for membership as a Fellow of the Litigation Counsel of America (LCA). The LCA is an invitation only trial lawyer honorary society representing less than one-half of one percent of American lawyers. Fellowship in the LCA is highly selective. Fellows are selected based upon effectiveness, accomplishment in litigation and trial work, and superior ethical reputations.

Mr. Stewart devotes his practice to civil litigation with concentration in the areas of commercial litigation including oil and gas litigation, product liability, construction defect, trucking and transportation, professional liability and specialized areas of toxic tort litigation. Mr. Stewart manages the Greensburg, PA office of Zimmer Kunz and is licensed to practice law in Pennsylvania and West Virginia.



George Stewart



Dara DeCourcy



Joseph Selep



Joseph Butcher

Pennsylvania Super Lawyers

For the second year in a row, **Dara DeCourcy**, **Joseph Selep** and **George Stewart** were recognized by Pennsylvania Super Lawyers Magazine as outstanding lawyers in the practice areas of Insurance Coverage (DeCourcy), Personal Injury Defense (Selep) and Civil Litigation Defense (Stewart). According to Pennsylvania Super Lawyers magazine, only five per-

cent of lawyers in the state earn the Super Lawyer distinction in a rigorous selection process that involves a peer review nomination process supplemented by third party research.

Pennsylvania Super Lawyers Magazine this year also recognized **Joseph Butcher** as one of Pennsylvania's Rising Stars in the practice

area of General Litigation. This distinction recognizes top young attorneys under the age of forty who have been practicing for less than ten years. Only the top two and a half percent of eligible lawyers earn the distinction which is based on a peer review process.

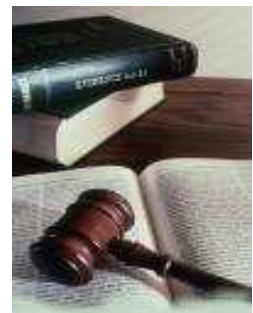
Health Care Reform (continued from first page):

Hospital and facility expense which accounts for about a third of workers' compensation medical spending is projected to rise ostensibly because of cost shifting. Hospital revenues will be down and workers' compensation could be the vehicle by which hospitals and facilities make up for lost revenues. The new Health Care Reform did not give CMS the power to negotiate drug pricing with

pharmaceutical companies hence those companies raised brand drug prices in 2009 by more than nine percent.

Interestingly, some commentators have suggested that when employers do not offer health insurance, employees file more workers' compensation claims. This theory is refuted in a 2005 Rand study which shows that employers that

do not offer health insurance do not have more workers' compensation claims. At least one expert believes that the increased percentage of population covered by health insurance increases will cause providers to look less to workers' compensation to make up for revenue short falls. In addition, if indeed Health Care Reform provides improvements in overall (continued on page 4)



Health Care Reform (continued from Page 3)

patient health as it touts, will this translate into a healthier work force? The theory, of course, is that healthier people will recover from injuries and return to work faster.

But another theory also prevails. With group health plans less able to make risk selections, they will, out of necessity, manage the costs and care with more scrutiny. Investments in chronic disease management will improve technology and could filter its way down into the workers' compensation system and actually improve matters.

Could the employee who suffers from diabetes or hypertension, conditions which are often deemed to be aggravated by work injuries because of complications which result from surgery and other injuries, be treated more aggressively under the new Health Care Plan, thus reducing the number of workers' compensation payouts when those conditions are disturbed by work injuries?

Will the same incentives exist for an injured worker who does not like his job, who treats more than is medically necessary, prolonging disability and avoiding work still be an issue when a federal mandate exists to improve all health services and increase preventive measures? Remember, there is no cost shifting in workers' compensation. The injured worker does not bear the brunt of increased premiums nor does the provider. How will this mesh with federal mandates?

Section 2401 of the new bill specifies that if a state elects to expand Medicaid

services to provide home and community based attendant services and support under the Community First Choice Option, such support and services must be provided in accordance with the FLSA and the provisions of the state unemployment and workers' compensation insurers. Conventional wisdom suggests that new workers' compensation policies will be needed to adjust for those changes. Section 10109 of the new Act provides for development of standards by the Secretary of Health and Human Services so as to enable the exchange of financial and administrative transactions and with the goal of improving the operation of the health care system and reducing administrative costs. The government will seek input on activities and items relating to a number of areas including whether standards and operating rules described in Section 1173 of the Social Security Act should apply to health care transactions, automobile insurance, workers' compensation and other programs or persons. This would suggest that even more changes in the workers' compensation systems nationwide would have to be made in order to comply with federal mandate.

Ultimately, Health Care Reform is intended to provide treatment access and coverage over a broad scope with the federal government as the overseer. Workers' compensation programs continue to be operations of the state. There is no direct reference to the state workers' compensation system within the framework of the Health Care Bill. Certainly, if the New Health Care Reform Law impacts physician availability and

accessibility, it could impact injured workers' treatment. As we speak, we are suffering from a shortage of primary care doctors. Will 30 million more people, now covered by health care, further strain that dynamic and affect the delivery of medical treatment of injured workers? Much discussion centers on whether injured workers will file with their health care insurer or their worker compensation insurer. We really do not know the answer to that question at this point. Remember, the intimacy of the small practice doctor may be a dissolving concept as more and more doctors become employees of hospitals and health care systems.

Thus, changes in the way we treat are not all attributable to the impending changes brought about by the Health Care Reform Act. The overhead of a small practice has been growing for years and thus the basis for the corporate doctor model. Changes in the reimbursement rate could further fuel this movement. Occupational medicine clinics that have doctors specializing in treating work place injuries might increase and should not be affected by the Health Care Reform Law directly. Accessibility and availability of providers remains to be seen.

Thanks to Karen Wolfe, Founder and President of Med Metrics, LLC, Peter Rousmaniere and Joseph Padudu of Manage Care Matters.

Written by,

Edward Dixon, Esq.

News (continued from page 3)

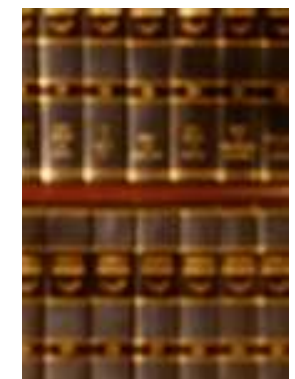
Attorney **Matthew Breneman** prepared an article for Defense Trial Counsel of West Virginia. The article entitled "UM/UIM Coverage: Enforceability of 'Other Insurance' Clauses." The article focused on the case of *Cunningham v. Walter Lee Hill, et. al.*, Supreme Court of Appeals No. 34861. In *Cunningham*, the Plaintiff was operating a vehicle owned by his employer when he was involved in an accident. Because his employer's policy did not afford him UIM coverage, the Plaintiff sought coverage from two different policies he had on his personal vehicles. The respective policies were issued by Erie and State Farm. Each of the policies

contained "other insurance" clauses which limited the amount of recovery to the highest amount of UIM coverage available under all applicable policies. Of course the Plaintiff asserted that he was entitled to recover the limits from both policies. This was a matter of first impression in West Virginia. The article examined the arguments set forth by the plaintiff and insurers while the case was pending before the Supreme Court of Appeals of West Virginia. Ultimately, the Court held that "when two insurers issue separate automobile liability insurance policies upon different vehicles containing underinsured motorist coverage which provide

coverage for the same loss, policy language which provides that the limits of the policy with the highest limit of underinsured motorist coverage is not valid and enforceable." In ruling, the Court looked to W.Va. Code Section 33-6-31(b) which states, in relevant part, that "[n]o sums payable as a result of underinsured motorist coverage shall be reduced by payments made under the insured's policy or any other policy." This ruling must be kept in mind when dealing with the unusual circumstance where an insured has two different UIM policies to afford coverage for an accident.



Matthew Breneman



Chepkevich v. Hidden Valley Resort (continued from first page)

Nicholas was not able to position himself properly on the seat, and he began to fall. Lori, who was seated, tried to pull Nicholas onto the seat but was unsuccessful, and they both fell. Nicholas was not seriously injured, but Lori dislocated her shoulder and fractured a hip.

Lori filed a lawsuit against Hidden Valley in the Somerset County Court of Common Pleas for the injuries sustained from her fall. Hidden Valley moved for summary judgment on the basis of the Skier's Responsibility Act, 42 Pa.C.S. § 7102(c), and the Release Lori signed when she purchased her season pass to the resort. The trial court granted summary judgment in favor of Hidden Valley. The Superior Court, on appeal, reversed and remanded. Hidden Valley's petition for allowance of

appeal to the Supreme Court was granted.

Chief Justice Castille, writing for the majority, first addressed the Skier's Responsibility Act, 42 Pa.C.S. § 7102(c). He noted that it was enacted to preserve the common law assumption of the risk defense to injuries suffered while downhill skiing. The court further stated that the doctrine had been described as a "no-duty" rule. This rule was still applicable to operators of ski resorts, and as such, they were under no duty to protect skiers from risks that are inherent or "common, frequent, and expected." The court determined that Lori was engaged in the sport of downhill skiing at the time of her injury, and falling from the ski lift while boarding was an inherent risk of the sport. The Act barred the lawsuit be-

cause Hidden Valley was under no duty to protect Lori and the lift operator was under no duty to stop the lift.

The court then focused on the liability release that Lori signed when she purchased her season pass. Justice Castille restated the law that exculpatory agreements are generally valid when: (1) they do not contravene public policy; (2) the contract is between persons relating entirely to their own private affairs; and (3) each party is a free bargain agent so that the contract is not one of adhesion. The clause may still be unenforceable unless it is clear that a person is being relieved of liability for his own acts of negligence.

(continued on page 6).

Results (continued from page 2)

Case five: Attorney Kerri Shimborske-Abel successfully defended an awning manufacturer and installer wherein multiple Plaintiffs had delivered their awnings for winter storage to the awning company under a bailment situation. Unfortunately, while the awnings were stored off of the awnings company's premises, they were destroyed in a fire. The fire was deemed accidental by the Pennsylvania State Police Fire Marshall. At the time of the arbitration hearing, the Plaintiffs were unable to show that the awning manufacturer and installer was negligent in its storing of the Plaintiffs' awnings. Therefore, a verdict was entered in favor of the awning manufacturer and installer.

Case six: A jury in Butler County, Pennsylvania returned a defense verdict in a lawsuit arising out of the collapse of a deer hunting tree stand. In this recent case, the 40 year old Plaintiff sustained a burst fracture at the L1 level after he fell 25 feet. A five level fusion with significant instrumentation was required to treat the burst fracture. The Plaintiff fell during the course of the installation of the tree stand. The court held as a matter of law that the tree stand was a defective product because the belt that held the tree stand to the tree broke as a result of the manufacturer's failure to stitch the belt together. The Taiwanese manufacturer of the tree stand was out of business thereby leaving the parties involved

in the distribution of the tree stand to defend the lawsuit. In a pre-trial ruling, the court barred the Defendants from arguing that the Plaintiff fell because he failed to wear the safety strap that was provided with the tree stand. At trial, the Defendants argued that although the product was defective, the accident was caused by the Plaintiff's improper installation of the tree stand. A unanimous jury determined that the Plaintiff had not proven causation and found in favor of all Defendants. Prior to trial, the Plaintiff demanded \$1,250,000 to settle and the Defendants collectively offered \$400,000. The importer of the tree stand was represented by **John W. Zotter** of Zimmer Kunz.



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Chepkovich v. Hidden Valley Resort (continued from page 5) :

The court reasoned that an "exculpatory agreement conditioning use of a commercial facility for such activities" is not a typical contract of adhesion. The signer is not compelled to participate in the voluntary recreational activity, and as a free agent, can simply walk away without participating or signing. After applying the rules, the court held that Lori was not compelled to sign the release and the exculpatory agreement was valid.

Next, the court addressed the issue of whether the contract was one of adhesion because it did not define the term "negligence." The court found that exculpatory agreements do not need to include the term "negligence," and if the release does include the term, the release is not invalid because the term is not defined.

After determining that the Act applied to the facts of this case and that the Release was valid, the court reinstated the trial court's order granting summary judgment in favor of Hidden Valley.